

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

9 GILBERTO MALDONADO,	)	No. CV-F-07-1536 OWW
	)	(No. CR-F-02-5408 OWWO
	)	
11 Petitioner,	)	ORDER DENYING PETITIONER'S
	)	MOTION FOR RECONSIDERATION
12 vs.	)	OF DENIAL OF SECTION 2255
	)	MOTION, ORDERING
13 UNITED STATES OF AMERICA,	)	PETITIONER'S ATTORNEYS TO
	)	TURN OVER LEGAL MATERIALS,
15 Respondent.	)	AND REQUESTING STAY OF ALL
	)	RULINGS UNTIL PETITIONER
	)	RECEIVES LEGAL MATERIALS
	)	(Doc. 380)
16	_____	)

17  
18  
19 By Memorandum Decision and Order filed on May 22, 2008,  
20 Petitioner Gilberto Maldonado's motion to vacate, set aside or  
21 correct sentence pursuant to 28 U.S.C. § 2255 was denied.  
22 Judgment for Respondent was entered on May 22, 2008.

23 Petitioner moves for reconsideration, for an order directing  
24 his trial counsel to provide him with all legal materials, and to  
25 stay all proceedings until Petitioner receives his legal  
26 materials. Petitioner contends that he is entitled to

1 reconsideration because his defense counsel, Steven D. Bauer, and  
2 appellate counsel, John Ward, never provided him with copies of  
3 his files, despite repeated requests. Attached to Petitioner's  
4 motion for reconsideration are copies of letters to and from  
5 Petitioner, Mr. Ward and Mr. Bauer.

6 Petitioner was represented in the District Court by Steven  
7 Bauer and Jeffrey Rosenblum. Petitioner was represented on  
8 appeal by John Ward. Attached to Petitioner's motion for  
9 reconsideration is a letter to Petitioner from Mr. Ward dated  
10 January 18, 2007, wherein Mr. Ward states:

11 I have sent you all the materials that I have  
12 concerning your case. The items you seek are  
13 most likely in the hands of your trial  
lawyer, and I suggest you have your writ-  
writer address his request to the trial  
lawyer.

14 Also attached in a letter from Petitioner to Mr. Ward dated  
15 February 6, 2007, advising that the deadline for filing a Section  
16 2255 motion is one year and requesting that he be provided with  
17 the following documents:

18

- 19 a) Indictment;
- b) Warrant and Affidavit;
- c) Discovery, motions and orders;
- d) Pre-trial motions and orders;
- e) Suppression motions and orders;
- f) Voir dire;
- g) Jury instructions;
- h) Trial transcripts;
- i) Sentencing transcripts;
- j) Opening/closing arguments;
- k) Specile [sic] jury verdict forms;
- l) Jury pool pacement [sic]/selections;
- m) Verdict;
- n) Objections to PSI;
- o) Pre sentencing motions;
- p) Witness list-trial/sentencing;

- 1 q) Judgment [sic] and commitment order;
- 2 r) Notice of appeal;
- 3 s) Government's brief and appellant response  
brief;
- 4 t) Unterooffice [sic] files and notes ....

5 Petitioner submits a copy of a letter from Petitioner to Mr.  
6 Bauer dated February 21, 2007, advising Mr. Bauer of a recent  
7 letter from Mr. Ward contending "he holds no paperwork of any  
8 kind and that it is probably in 'the hands of your trial  
9 lawyer.'" Petitioner requests Mr. Bauer provide copies of the  
following:

- 10 a. Indictment/superseding indictments;
- 11 b. Arrest warrant and supporting affidavits;
- 12 c. Motion for conflict of interest by USA on  
all dates;
- 13 d. Hearing transcripts of that matter on  
2/18-03;
- 14 e. Memorandums [sic], motions and orders  
relating to all pretrial proceedings;
- 15 f. All discovery, motions, and orders;
- 16 g. Orders relating to the conflict of  
interest matters;
- 17 h. Transcripts of the minutes of hearing on  
6-09-03;
- 18 i. Plea agreements with any co-defendants  
and sentence imposed in those cases;
- 19 j. All 404(b) and 609 matters, motions,  
orders, etc.;
- 20 k. Voir dire and jury instruction  
transcripts;
- 21 l. Trial briefs by USA;
- 22 m. Plea agreements entered;
- 23 n. Jury selection and listing (to determine  
if any racial or improper jury matters);
- 24 o. Trial exhibits and witness lists;
- 25 p. Trial transcripts from June 2 to August  
6, 2004;
- 26 q. In camera minutes;
- r. Supplemental jury instructions and  
closing arguments;
- s. Jury notes and minutes of hearings on  
those questions;
- t. USA preliminary order as to forfeiture  
and Order;

1       u. Notice and motion of PSI of 10/19/04,  
2            answers and Orders;  
3       v. Presentence hearing transcripts and  
4            matters;  
5       w. Sentencing transcripts;  
6       x. Judgment and comitment [sic] Order;  
7       y. Notice of Appeal;  
8       z. Appellant response brief, and Appellant  
9            answer;  
10      A1. Appellate decision;  
11      A2. Final Order on forfeiture;  
12      A3. Interoffice files regarding my case;  
13      A4. Any other documents, records, files, and  
14            property relating to my case.

15     These documents are important to prepare my  
16     meaningful § 2255 motion. I request your  
17     prompt attention in these matters so I can  
18     make mt [sic] motion timely, because I can't  
19     remember all details to guess at issues that  
20     might exist.

21     By letter dated February 26, 2007, copied to Mr. Rosenblum, Mr.

22     Bauer wrote to Petitioner:

23     There seems to be some confusion about who is  
24     supposed to do what. I had a number of  
25     telephone conversations with Mr. Ward around  
26     the time of your sentencing. There was also  
   an exchange of e-mails at about the same  
   time. All of these communications were  
   related to his obtaining your file from Jeff  
   [Rosenblum] so he could pursue your appeal.  
   Although your file has always been available  
   to Mr. Ward he has never picked it up.  
   Without that file it is unlikely that he has  
   been unable to complete your direct appeal.  
   Until your direct appeal is complete a 2255  
   petition would be untimely.

27     I will make Jeff [Rosenblum] aware of this  
28     request as he is in possession of your files,  
29     which I believe contains all of the documents  
30     you have requested. It still appears to me  
31     that your file would be better off in the  
32     hands of your appellate attorney but if you  
33     instruct us to do so we will ship the file to  
34     you. You are correct that it is your file  
35     and we will do was you instruct, so please  
36     let me know where you want it sent.

1 By letter sent certified mail on March 16, 2007, Petitioner wrote  
2 to Mr. Bauer:

3 Thank you for your prompt letter recently. I  
4 do agree that it is difficult to determine  
5 how a complete appeal could be made without  
6 obtaining the file from your office, but the  
7 appeal has been done and denied. Therefore,  
8 sending anything to Mr. Ward is not  
9 practicable. Thus, nothing need be sent to  
10 the appellate attorney.

11 Because the appeal is complete, I would  
12 request you forward the complete file to me  
13 at the above heading.

14 By letter dated June 15, 2007, Petitioner wrote to Mr. Ward:

15 Mr. Ward this communication is to request  
16 some information from you and if possible get  
17 some documents that may be in your  
18 possession. The questions that I have are  
19 the following: What was the criminal history  
20 level, what level offense did I start and  
what adjustment was given to me (if any).  
Also, if you have copies of my trial  
transcripts and all records pertaining to my  
case in order to prepare to submit my § 2255.  
I am aware that some time has elapse since  
the denial of my direct appeal, therefore I  
hope that you could help me out with this  
[sic] questions and request of documents.

21 Mr. Ward responded by letter dated July 4, 2007: "I do not have  
22 the information you seek, but I believe you may obtain it from  
23 your trial counsel."

24 Petitioner asserts that "to this date, Mr. Bauer have [sic]  
25 not mailed the petitioner any of his legal material." Petitioner  
26 contends:

27 [T]he petitioner do [sic] not understand the  
28 laws or have any money to obtain an attorney  
29 to help him with his legal problems. The  
30 petitioner let a jailhouse lawyer prepare his  
31 § 2255 motion which the jailhouse lawyer

1 never had any of the petitioner's transcripts  
2 or records pertaining to the petitioner [sic]  
3 case which the jailhouse lawyer argued the  
same issues that the Court had already denied  
at the petitioner's sentencing hearing.

4 Petitioner filed his Section 2255 motion on October 17, 2007  
5 (pursuant to the "mailbox rule"), just ten days shy of the  
6 expiration of the one-year limitation period. Petitioner did not  
7 assert in his Section 2255 motion that he did not have access to  
8 his files or that he had been unable to obtain them from counsel  
9 and did not request any delay or stay in the resolution of the  
10 Section 2255 motion because he did not have access to his files.  
11 Mr. Bauer's letter dated February 26, 2007 advised Petitioner  
12 that his files were in the possession of Mr. Rosenblum and that  
13 Mr. Bauer would forward Petitioner's request to Mr. Rosenblum.  
14 Petitioner presents nothing from which it may be inferred that  
15 Petitioner ever attempted to contact Mr. Rosenblum to obtain the  
16 files.

17 The one year limitation period may be extended by equitable  
18 tolling, but only where "extraordinary circumstances beyond a  
19 prisoner's control make it impossible to file a petition on  
20 time." *Espinosa-Matthews v. California*, 432 F.3d 1021, 1026 (9<sup>th</sup>  
21 Cir.2005). A Petitioner "seeking equitable tolling bears the  
22 burden of establishing two elements: (1) that he has been  
23 pursuing his rights diligently, and (2) that some extraordinary  
24 circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S.  
25 408, 418 (2005). Determining whether equitable tolling is  
appropriate is a "highly fact-dependent inquiry", *Whalem/Hunt v.*

*Early*, 233 F.3d 1146, 1148 (9<sup>th</sup> Cir.2000), and the movant "bears the burden of showing that equitable tolling is appropriate." *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9<sup>th</sup> Cir.2005).

Petitioner's motion is DENIED. Petitioner did not assert that the absence of his files precluded him from raising claims in support of his Section 2255 motion until after the motion was denied. Petitioner presents no evidence and makes no contention that he contacted or attempted to contact Mr. Rosenblum after being advised by Mr. Bauer that the files were in Mr. Rosenblum's possession. The absence of this evidence establishes that Petitioner did not pursue his rights diligently and that some extraordinary circumstance stood in his way that prevented him from including all claims in the Section 2255 motion.

IT IS SO ORDERED.

Dated: June 17, 2008

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE